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In the Supreme Court of the United States

OCTOBER TERM, 1994

SHONG-CHING TONG, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR ASSURED THRIFT AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the California Court of Appeal, having previously identified petitioner as a vexatious litigant, correctly dismissed his appeal.

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OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A1-A4) is unpublished. The Order of Dismissal from the Los Angeles County Superior Court (Pet. App. C1-C2) is unreported. The order of the California Supreme Court denying petitioner's petition for review (Pet. App. B1) is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on December 28, 1993. The California Supreme Court denied petitioner's petition for review on March 2, 1994. The petition for a writ of certiorari was filed on

May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On March 27, 1991, petitioner filed an action titled *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, Case No. KC 004452, in Los Angeles County Superior Court. On the same date, petitioner filed a virtually identical action in the same court titled *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, Case No. KC 004451.

2. On January 3, 1992, the Federal Deposit Insurance Corporation (FDIC) was appointed liquidator of Assured Thrift & Loan Association (Assured). On February 13, 1992, the FDIC notified petitioner that the FDIC was liquidator for Assured and that, before proceeding with either action, petitioner must first exhaust his administrative remedies under the claims process established by the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(d)(3) (Supp. IV 1992), by submitting a written Proof of Claim to the FDIC by April 22, 1992. Petitioner filed a Proof of Claim with the FDIC on approximately March 3, 1992.

At the time petitioner submitted the Proof of Claim, petitioner requested that the Los Angeles County Superior Court enter a default against the FDIC, as successor to Assured in both actions. The court did not do so, but granted a motion by the FDIC to stay the actions for 180 days from April 22, 1992. Following expiration of the stay, on March 4, 1993, the FDIC moved to dismiss both of petitioner's actions for lack of subject matter jurisdiction, arguing that under FIRREA petitioner could obtain review of an administrative claim denied by the FDIC only in an appropriate United States

District Court. On May 10, 1993, the Superior Court granted the FDIC's motion. Pet. App. C1.

3. On or about June 4, 1993, the FDIC denied petitioner's claim, and informed petitioner of the denial.

Petitioner then appealed the dismissal of this state-court action to the California Court of Appeal. Petitioner also appealed the dismissal of his second state-court action to the California Court of Appeal. *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, No. B 077108 (June 10, 1994).[1]

On August 2, 1993, petitioner filed a complaint for damages in the United States District Court for the Central District of California (Case No. 93-4571 JMI(JRX)). That complaint made the same allegations against Assured and the FDIC as had petitioner's two previous state-court complaints.

On November 24, 1993, the court of appeal in this case judicially noticed the contents of the record in *Tong* v. *Superior Court*, where petitioner was recognized as a vexatious litigant pursuant to Cal. Civ. Proc. Code § 391.7 (West 1990). Pet. App. E1-E2.[2] The court of appeal

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[1] The California Court of Appeal recently reversed the dismissal in this second case on the ground that it had concurrent jurisdiction, but suggested that the claim be removed to federal district court and consolidated with the claim in the federal judicial forum. See *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, No. B 077108 (June 10, 1994).

[2] A "vexatious litigant" is defined as a person who: (1) has commenced at least five litigations within a seven-year period which have been either determined adversely or not prosecuted; (2) repeatedly relitigates finally determined issues; (3) repeatedly uses tactics that are frivolous or intended to cause unnecessary delay; or (4) has been declared a vexatious litigant by a state or federal court of record based upon the same events that the litigant seeks to relitigate. Cal. Civ. Proc. Code § 391.0(b) (West 1990).

sua sponte issued an order staying the appeal and directing petitioner to explain why his appeal had merit. The court, after reviewing petitioner's response to its order, noted that petitioner "admits the present case should be in federal court rather than before this court." *Id.* at A3. The court therefore concluded that the appeal was meritless and had been brought for purposes of harassment. *Ibid.* Consequently, on December 28, 1993, the court dismissed the appeal. *Id.* at E1. The court of appeal subsequently denied petitioner's motion for reconsideration.

Petitioner sought review of the dismissal of his appeal in the California Supreme Court. His petition for review was denied on March 2, 1994. Pet. App. B1.

ARGUMENT

1. Petitioner appears to be challenging the California Court of Appeal's dismissal of his appeal as a violation of the Due Process Clause. That court's application of a state rule of procedure requiring that vexatious litigants receive permission from the presiding judge before continuing litigation raises no substantial due process issue. The Due Process Clause does not bar California from adopting rules intended to protect its courts from abuse by willful litigants. In any event, the California Court of Appeal did not dismiss petitioner's claim solely on procedural grounds, but held that petitioner had failed to demonstrate that his appeal had any merit. That substantive basis for dismissal raises no conceivable due process concerns.

2. Petitioner also claims (Pet. 8-11) that the California Court of Appeal erroneously found him to be a vexatious litigant. That contention solely raises issues of state law and is, in all events, without merit.

The court of appeal took judicial notice that petitioner had been determined to be a vexatious litigant in another matter. See *In re Finding of John Luckett as a Vexatious Litigant*, 283 Cal. Rptr. 312 (1991) (holding that court may take judicial notice of documents filed with the court, even in other cases, to determine whether a party is a vexatious litigant), review denied (Sept. 25, 1991). Because petitioner had previously been found to be a vexatious litigant, he was subject to Cal. Civ. Proc. Code § 391.7(c) (West 1990), which requires a vexatious litigant to receive court permission before filing *any* litigation.[3] That rule provides:

> The clerk shall not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. * * * The litigation shall be automatically dismissed unless the plaintiff * * * obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b).

Cal. Civ. Proc. Code § 391.7(c) (West 1990). Petitioner did not seek the required permission before filing his appeal, and the court of appeals subsequently denied permission because petitioner failed to show that his appeal had any merit.

3. Petitioner contends (Pet. 9-10) that the court of appeal erroneously concluded that the state courts do not have concurrent jurisdiction with the appropriate United States district court to hear cases concerning

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[3] "Litigation" is defined by Cal. Civ. Proc. Code § 391.0(a) (West 1990), which states that litigation "means any civil action or proceeding, commenced, maintained or pending in any state or federal court of record." Petitioner's appeals to the California Court of Appeal qualify as litigation under this provision.

claims against the FDIC. He claims that the decision below conflicts with another case from the court of appeal, *Robbins* v. *Foothill Nissan*, 28 Cal. Rptr. 2d 190 (1994), which was decided after petitioner's case was dismissed.

In *Robbins*, consumers brought an action in state court against automobile dealerships and banks, alleging a variety of improprieties associated with financing agreements related to the purchase of automobiles. Subsequently, the FDIC became receiver of one of the banks that was a party to the state-court action. The Superior Court granted the FDIC's motion to dismiss on the grounds that federal courts had exclusive jurisdiction over the action.

On appeal, the FDIC argued that, pursuant to 12 U.S.C. 1821(d)(6) and (13) (Supp. IV 1992), only federal district courts possessed subject matter jurisdiction over claims against insolvent banks denied by the FDIC, even where the claim was filed in state court prior to the bank's insolvency. The California Court of Appeal disagreed, holding that in claims against banks originating in state court prior to a bank's insolvency, which claims subsequently are administratively denied by the FDIC under FIRREA, state courts and federal courts have concurrent jurisdiction and claimant may obtain review in either forum. 28 Cal. Rptr. 2d at 197-198.

Here, unlike the situation in *Robbins*, petitioner chose to seek review in federal district court of FDIC's denial of his claims. In this case, by saying that the issue should go forward in petitioner's federal-court action, the California Court of Appeal has done no more than honor petitioner's choice of forum, and by holding him to that choice, is avoiding duplicative, potentially conflicting disposition of identical claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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